

## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MAR 10 2000

Mr. Max Weintraub  
U.S. Environmental Protection Agency  
Region IX  
75 Hawthorne Street  
San Francisco, CA 94105


Dear Max:

You have asked for our view on whether a PCB commercial storage facility may be sold, and its permit transferred, under the following circumstances. On December 20, 1994, Region IX issued the facility a permit that stated, "This approval shall expire on December 31, 1999 unless the applicant makes a written request for renewal of this approval at least 180 days prior to the expiration date." The facility submitted a timely application for permit renewal. EPA has not acted on that application. Meanwhile, the owners of the facility wish to sell it and have found an interested buyer. The facility wants to transfer the permit to the buyer. You ask whether the facility may do so before EPA completes review of the application.

Nothing in the PCB regulations at 40 CFR part 761 would prevent this transfer. By its terms, the original permit has not expired, since the facility prevented that expiration by submitting a timely renewal application. The sale should be treated as would any other transfer of an active commercial storage facility (see 40 CFR 761.65(j) and its accompanying preamble at 63 FR 35423 for more details).

Please let me know if you would like to discuss this further.

Sincerely,

  
Tony Baney, Chief  
Fibers and Organics Branch

## CONCURRENCES

SYMBOL								
SURNAME								
DATE								

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0002

**GALLAGHER & KENNEDY**

P.A.

ATTORNEYS AT LAW

DAVID L. WALLIS  
DIRECT DIAL: (602) 530-8136  
E-MAIL: DLW@GKNET.COM

**CONFIDENTIAL COMMUNICATION**

2575 EAST CAMELBACK ROAD  
PHOENIX, ARIZONA 85016-9225  
PHONE: (602) 530-8000  
FAX: (602) 530-8500  
WWW.GKNET.COM

February 23, 2000

**BY FACSIMILE**

Mr. Max Weintraub, CMD-4-2  
U.S. Environmental Protection Agency  
Region IX  
75 Hawthorne Street  
San Francisco, CA 94105

Re: **Transfer of Permit to Commercially Store PCBs -- Salesco Systems  
USA, Inc. -- Arizona**

Dear Mr. Weintraub:

Thank you for the opportunity to speak to you today about the transfer of Salesco Systems USA, Inc.'s ("Salesco") approval to commercial store PCBs at its Phoenix, Arizona facility. The approval was granted to Salesco in a letter dated December 15, 1994, a copy of which is attached. Salesco hereby requests EPA to transfer the approval to Superior Special Services, Inc ("Superior"), a Wisconsin corporation affiliated with Onyx Environmental, on or before April 15, 2000, which is the closing date for the sale of Salesco's assets to Superior. Upon closing, Superior would continue to operate the PCB storage facility in compliance with the current approval. Salesco's management team for the facility would remain in place after the sale. The only change pertinent to the current approval would be new financial assurance that Superior would provide to EPA.

During our telephone conference, you raised an issue about EPA's ability to transfer the approval to operate the PCB storage facility. As clearly stated in the December 15, 1994 letter, one condition of the approval was that it would expire on December 31, 1999, unless Salesco submitted a written request for renewal of the approval "at least 180 days prior to the expiration date." In a letter from Ms. Paula Bisson of EPA dated January 12, 2000, EPA acknowledged that Salesco had made a "timely and sufficient application" for renewal. Thus, the approval never expired and should be transferable.

The concern, which you expressed to me, was that the regulations under the Toxic Substances Control Act ("TSCA") do not specifically state that an approval (or permit) for which a renewal request is received may be transferred under 40 C.F.R. § 761.69(j). While we agree

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Mr. Max Weintraub  
February 23, 2000  
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that subsection (j) does not specifically refer to "permit extensions," there are a number of reasons why such a reference is not necessary.

First, the terms of the 1994 approval state simply that the approval expires on the deadline unless a request for a permit renewal is submitted. As that request was filed in a "timely and sufficient" manner, the existing permit never expired and remains in effect and transferable. This conclusion is supported by the letter from Ms. Bisson, which states that "the existing permit and all of its requirements continue to be in effect until the process for considering the permit renewal is complete." EPA's determination in that letter was based on the language of the Administrative Procedures Act which states explicitly that "when the licensee has made timely and sufficient application for renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency." 5 U.S.C. § 558.

In a case involving the extension of a temporary 180-day permit under the Interstate Commerce Act, the United States Supreme Court relied on this specific section of the APA to hold that the agency could extend the 180-day permit until it completed its hearings on a permanent permit. The rationale of the Supreme Court was that the APA provision was intended "to protect a person with a license from the damage he would suffer by being compelled to discontinue a business of a continuing nature, only to start it anew after the administrative hearing is concluded." *Pan Atlantic Steamship Corp. v. Atlantic Coast Line Railroad Company*, 353 U.S. 436, 439 (1957).

As in the case before the Supreme Court, the conditions of the APA have been satisfied by Salesco so the provision clearly applies. In fact, the Salesco permit is not a "temporary" permit as was the case above, but has been in effect for five years. Because the existing permit continues in effect until EPA completes the permit renewal review, the permit should be transferable under 40 C.F.R. § 761.69(j) which simply states that "the date of transfer of . . . final approval shall be the date that EPA . . . provides written approval of the transfer." Salesco has an existing and effective "final approval" which it can transfer under Section 761.69(j).

We note that the Ninth Circuit Court of Appeals has stated in general terms that that "[f]unctionally, there is no difference between reissuance of a permit for a certain period from the date of its expiration and an extension of the same permit for the same period." *Pacific Legal Foundation v. Cosile*, 586 F.2d 650, 655 (9<sup>th</sup> Cir. 1978). Consequently, the Court found that the proper resolution "is to treat a permit extension the same as a permit issuance." *Id.* This comparison provides additional support for the position that permits in the process of being renewed remain full and in effect permits until final agency action occurs.

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Mr. Max Weintraub  
February 23, 2000  
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We are aware in several instances that EPA has allowed extended permits to under the Clean Water Act and Clean Air Act to be transferred. Several of these instances have involved EPA Region IX.

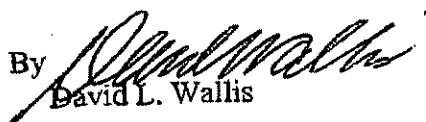
Salesco has complied with the condition of its approval that requires the submission of a request for an extension. Consequently, under the plain language of the APA as interpreted by the United States Supreme Court and Ninth Circuit, that approval remains in full force. The TSCA regulations specifically allow the transfer of an approval, and thus the transfer of the extended approval is proper.

We trust that this letter sufficiently addresses the issue that you raised. Please let us know what additional information you need in order to transfer the approval. Also, we appreciate your efforts to keep the pending sale of Salesco confidential.

Sincerely,

GALLAGHER & KENNEDY, P.A.

By

  
David L. Wallis

DLW/bp

Enclosure

cc: John H. King (Superior)

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JALCOO SYSTEMS CORP / J000101



## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street

San Francisco, CA 94105-3901

DEC 20 1994

DEC 15 1994

Mr. Frank D. Sales, Jr.  
President  
Salesco Systems USA, Inc.-AZ  
5736 West Jefferson  
Phoenix, AZ 85043

Re: Commercial PCB Storage and Lighting Ballast Recycling Approval  
EPA ID AZD 983473539

Dear Mr. Sales:

This letter, with enclosed conditions, serves as written approval pursuant to 40 CFR Parts 761.65 (d)(1) and 761.60 (e) for Salesco Systems USA, Inc.-AZ to commercially store PCBs and PCB articles and to recycle and dispose of PCB-contaminated lighting ballasts at 5736 West Jefferson, Phoenix, Arizona.

The Environmental Protection Agency (EPA) Region IX has reviewed your August 17, 1994 application to commercially store PCBs and to recycle and dispose of PCB-contaminated lighting ballasts and has determined that the Salesco Systems USA, Inc.-AZ operation at 5736 West Jefferson, Phoenix, Arizona will not pose an unreasonable risk of injury to health or the environment. This approval incorporates the closure plan submitted in the application and amendments offered in response to EPA's notice of deficiencies.

This approval shall expire on December 31, 1999 unless the applicant makes a written request for renewal of this approval at least 180 days prior to the expiration date.

The total amount of PCB materials and PCB items may not exceed 40,500 gallons of PCB waste and 7,700 gallons of non-PCB waste nor the quantity whose disposal cost would be more than Salesco's closure cost estimate for the maximum PCB inventory.

For PCB analyses, EPA approves the use of Salesco-AZ's on-site laboratory so long as the certification by the Arizona Department of Health Services remains in effect. Salesco-AZ may use any other laboratory certified for PCB analysis.

Salesco-AZ has chosen the trust fund as their financial assurance mechanism for closure. Acceptable documentation must be provided to EPA within 30 days from the date of this approval that the first payment into the trust has been received by the trustee. This first

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payment must be sufficient to meet the requirements of 40 CFR 761.65 (g)(1). Failure to meet this requirement shall be grounds for termination of this approval and Salesco-AZ will be required to initiate closure of the facility.

In addition to Region IX, a copy of the Annual Report should also be sent to:

Mr. Thomas G. Simons  
Office of Pollution Prevention and Toxics  
US EPA Headquarters 7404  
401 M Street  
Washington DC, 20460

If you have any questions regarding this approval, please contact Yosh Tokiwa of my staff at (415) 744-1109.

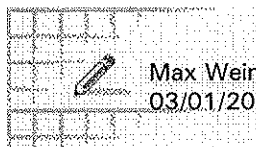
Sincerely,



David P. Howekamp  
Director  
Air and Toxics Division

Enclosure:

cc: David K. Hanneman, OPPT



Max Weintraub  
03/01/2000 01:38 PM

To: Julie Simpson/DC/USEPA/US@EPA, Dave Hannemann/DC/USEPA/US@EPA  
cc: Paula Bisson/R9/USEPA/US@EPA, Yoshiro Tokiwa/R9/USEPA/US@EPA, Christopher Rollins/R9/USEPA/US@EPA  
Subject: Salesco - Permit transfer during extension period

Dave and Julie,

I appreciate your thoughts this morning regarding the Salesco letter dated 2/23/00. As I stated, I requested the letter from Salesco because I was concerned about issues of precedence and politics.

Politically, Phoenix is quite active right now. There are four different PCB permitting activities taking place in the city and the community is already concerned about hazardous waste activities being conducted under RCRA. Region 9 plans to conduct public hearings to give the community an opportunity to participate in the PCB permitting process.

I seek an HQ response to the Salesco letter because I am concerned about the potential precedent the response may set. We have procedures in place for the transfer of a permit that has not expired. However, I need your guidance on how to handle the following scenario:

"A facility has a permit with an expiration date. The facility submits a timely application for permit renewal. The Agency grants the facility an extension of the permit while the application is reviewed. The facility finds a buyer. The facility requests a transfer of the permit to the buyer during the extension period and prior to completion of the Agency review. Should the Agency grant the facility request?"

I appreciate your insights on this situation and seek a written response to the Salesco letter. As the sale is imminent, Salesco desires a timely response.

Feel free to give me a call at 415-744-1129 if you have any questions.

Thanks,  
Max



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

MAR 10 2000

OFFICE OF  
PREVENTION, PESTICIDES AND  
TOXIC SUBSTANCES

Mr. Max Weintraub  
U.S. Environmental Protection Agency  
Region IX  
75 Hawthorne Street  
San Francisco, CA 94105

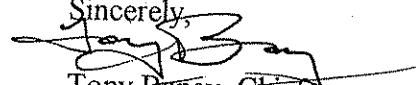
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Please let me know if you would like to discuss this further.

Sincerely,

  
Tony Baney, Chief  
Fibers and Organics Branch



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